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THE STATUTE OF FRAUDS AND POSSESSION AS PART PERFORMANCE THEREUNDER

The English Parliament in 1676 passed the Statute of Frauds, an act which was unequivocal in its terms, but in less than a decade after its enactment, the courts began to make exceptions, and these exceptions form the basis of the great modern doctrine of part performance.

In 1685, Sir George Jeffreys, Lord Chancellor under James II, delivered the decision in *Butcher v. Stapely*¹ which being soon followed by *Foxcroft v. Lester*² laid the foundation and precedent for that great chain of cases which formulates the modern doctrine.

The chancellors of the time did not wish to see a statute which had been passed for the prevention of fraud become an instrument of fraud. By seizing upon the title of the act they forsook its literal and mandatory provisions to seek justice in the wiser field of their own discretion. This is not unusual nor unexpected when the general conditions of the time are considered. According to Dean Pound:

"When *Butcher v. Stapely* was decided the air was full of ideas of natural law, on a higher plane than any human legislation, and the courts of law were about to decide that the king, in particular cases and on necessary and urgent occasions, could in his discretion dispense with the penal statutes.³ If for good reasons James II might dispense with a statute of Charles II requiring public officers to take a test oath, Lord Jeffreys might well feel that James' Chancellor for good reasons might dispense with another statute of Charles II requiring contracts for the sale of land to be in writing."⁴

The cases naturally fall into two great divisions, fraud and part performance. Further classifying the part performance group divides them also into two groups (a) where possession has been taken under the contract and (b) where possession is not possible and part performance is had in some other way. Following this classification, wherever delivery of possession is

¹ 1 Vern 363, 23 Engl. Rep. 524.

² 2 Vern. 456, Colles 108, 1 Engl. Rep. 205.

³ *Godden v. Hales*, Comb. 21, 2 Shower 475.

⁴ 33 Harvard Law Review 929.

possible the cases either fall under the divisions fraud or possession.⁵

Pomeroy differs from Pound, holding that the cases all go on a doctrine which he summarizes as "equitable fraud."⁶ This theory is expressed in *Gallagher v. Gallagher*.⁷ The argument in favor of Mr. Pomeroy's doctrine is almost unanswerable. There appears no logical grounds for distinguishing possession cases from fraud, but the law has grown up in that way, notwithstanding.

The doctrine of holding possession, either alone or accompanied by further acts, to be part performance sufficient to take the case wherein it is found from the operation of the statute of frauds has its basis in one or more of four main arguments, (a) livery of seisin, (b) the argument that the vendee might otherwise be sued as a trespasser, (c) the theory that the statute should be viewed from a procedural and not a substantive point of view, and (d) the argument that to hold otherwise would work a virtual fraud upon the vendee.

In favor of the livery of seisin theory for allowing possession to take a case from the statute, the idea is well expressed in *Poorman v. Kilgore*:⁸

"But as the customs of the country can never be suddenly and entirely broken down even by an act of Parliament it was natural that many cases should arise founded on the old customs where great injustice would be done unless the statute should receive an equitable interpretation."

The same general theory has also been developed by Mr. Justice Holt.⁹

⁵ Harvard Law Review 939.

⁶ Pomeroy, Equity Jurisprudence, 4 ed., section 1409.

⁷ 31 W. Va. 9, 13; 5 S. E. 297, which states: "The fraud which will entitle the purchaser to a specific performance is that which consists in setting up the statute against the performance after the purchaser has been induced to make expenditures, or a change of situation in regard to the subject matter of the agreement upon the supposition that it was to be carried into execution; and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of the rights it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case the vendor is held by force of his acts or silent acquiescence which have misled the purchaser to his harm to be estopped from setting up the statute of frauds."

⁸ 26 Pa. 365, 67 Am. Dec. 425.

⁹ 39 W. Va. 160, 19 S. E. 391.

Livery of seisin was at first accompanied by much formality but as time went on the formality decreased and the number of sales of land increased so that livery of seisin became common and unceremonial. Because of its degraded nature it offered great opportunity for fraud and the unjust deprivation of land from its just and equitable owner.¹⁰ and ¹¹

Livery of seisin being forgotten soon after the passage of the statute, it is urged that the courts have followed the decisions which held that possession will take the case from the statute without knowing the reasons which actuated the old courts in reaching these decisions.

The argument has been advanced that unless possession is permitted to make the case an exception to the statute the vendor might sue the vendee as a trespasser.¹² To permit the vendor to bring such an action after he has put the vendee into possession under a verbal contract would be to permit him to take advantage of his own wrong in repudiating his obligation and would be punishing the vendee for having complied with his own promise.¹³ This doctrine is explained in *Wilson v. West Hartlepool Ry. Co.*¹⁴ But would it not be a complete defense to prove that the vendee at worst was a licensee? The statute would be no bar to setting up the contract as a defense to show that the vendee was not a trespasser. So the court reasoned in *Ann Berta Lodge No. 421, I. O. O. F. v. Livermore.*¹⁵

¹⁰ Roberts, Statute of Frauds.

¹¹ Statute of Frauds, Browne, 4th Ed. 4.

¹² Pomeroy, Equity Jurisprudence, sec. 104.

¹³ 8 L. R. A. (N. S.) 870, note.

¹⁴ 2 De G. J. & S. 475, 46 Engl. Rep. 459.

¹⁵ 42 Texas 18, wherein the court says: "But is there in fact any necessity to enforce a contract, in violation of the plain letter of the law, to afford the purchaser protection against suits which, no doubt, in equity and good conscience he should have? To enable the purchaser to defend himself against such suits it is insisted that he must give in evidence the whole contract under which he entered. Grant it. The statute does not preclude the court from hearing proof of this kind if presented for any legitimate purpose. It merely forbids charging the party on such a contract after it has been proved. And surely if the court can to prevent fraud decree performance of the contract, notwithstanding the statute, it can protect the defendant on the same ground against the consequence of acts done under it and at the instance of the plaintiff. Delivery of possession might with more propriety be treated as license to enter and enjoy the rents and profits. And such license would surely protect against an action for trespass or rents, when the contract of sale through the default of the vendor has not been carried out, or, by the reason of the statute, cannot be enforced."

Since the vendee can establish the contract to show that he was not a trespasser the court can give full credit to the contract so established. From this it appears that the statute of frauds is procedural in its operation and not substantive and that a contract established by delivery of possession not explainable except by the contract does not come within the prohibition of the statute.¹⁶

On the other hand, an argument in favor of the doctrine that fraud and not livery of seisin influenced the courts in holding delivery of possession as good part performance is the fact that an examination of early cases which went on the ground of possession having been delivered discloses no hint that the courts were trying to protect the people in the exercise of their ancient customs, but rather reveals the desire to render general justice and equity.¹⁷ and ¹⁸

In a few states the provisions of the statutes relating to contracts for the sale of land or any interest therein have been held to require in all cases a memorandum in writing to make such contracts enforceable either in law or in equity.¹⁹

Courts which follow the livery of seisin idea have sufficient justification for holding that possession alone is sufficient part performance. The better reasoned decisions however, seem to hold that the basis of part performance is fraud and in jurisdictions where the doctrine is founded on fraud it seems more reasonable to hold that possession alone is not sufficient, but such acts are necessary together with the mere delivery of possession as would make a strict enforcement of the statute operate as a fraud upon the vendee. A contrary doctrine is expressed in *Pugh v. Good*.²⁰ In *Glass v. Hulbert*²¹ is found what we believe to be the sounder doctrine.

There are certain general requirements which must necessarily characterize the possession in order to make it an act of part performance. In the first place the possession of the vendee must be actual and notorious,²² and the acts of possession

¹⁶ Williston, Contracts, 494.

¹⁷ *Morphet v. Jones*, S. C. 1 Wils. Ch. 100, 36 Engl. Rep. 344.

¹⁸ *Butcher v. Stapely*, *supra*.

¹⁹ By decisions in Kentucky, Mississippi, North Carolina, and Tennessee.

²⁰ 3 Watts and S. 56, 37 Am. Dec. 534.

²¹ 102 Mass. 25, 3 Am. Rep. 418.

²² 46 W. Va. 99, 33 S. E. 103.

must be in pursuance of the contract.²³ The possession, however, must be not only in pursuance of the contract but exclusively referable to the contract as pleaded. In *Allen v. Bermis*²⁴ Chief Justice Bishop, of the Supreme Court of Iowa makes the following assertion:

"It has been repeatedly held and is now a well settled doctrine, that the continuance in possession by a tenant cannot be deemed a part performance, or to be such possession as to take the case out of the statute. The possession must unequivocally refer to and result from the agreement."

Still another requirement is that the possession must be exclusive.²⁵ Furthermore, the possession must also be with the consent of the vendor and for the purpose of the transfer as expressed in the verbal contract. The reason for the rule is indicated in *Foster v. Maginnis*.²⁶ The English rule is apparently well settled upon the proposition that the delivery of possession alone is sufficient part performance²⁷ and.²⁸ In America several states follow the doctrine that possession alone is sufficient, but even more hold that possession alone is insufficient.²⁹

Having studied the development of the rule and its crystallization to the present day law in the different jurisdictions we come to the more difficult philosophical problem as to what the law should be and the character of the present tendency. When we look at the wording of the statute and compare the law as expressed therein with the application of that law under the doctrine of part performance we are struck by the wide variance between the law as handed down by Parliament and the state legislatures and the law as applied by the courts. That this variance exists will admit of but little doubt.

²³ 32 L. J. Ch. 441, 55 Engl. Rep. 175.

²⁴ 170 Iowa 172, 94 N. W. 560.

²⁵ 43 W. Va. 149, 27 S. E. 309.

²⁶ 89 Cal. 264, 26 Pac. 828, wherein Justice Garroute says: "Equitable fraud is the basis of this character of action; that is, fraud as a necessary consequence of setting up the statute as a defense and the vendor thus securing for himself the benefits of the acts of part performance. It follows from this principle that the acts of part performance must be done by the party seeking to enforce the contract and must be done with the consent and knowledge of the other party."

²⁷ Lord Aylesford's Case, 2 Strange 783.

²⁸ *Olerk v. Wright*, 1 Atk. 12.

²⁹ See list of cases in the American Law Institute's Restatement of the Law of Contracts, section 194.

Recognizing the departure of the courts from the letter of the law and their establishment thereby of a doctrine cut from whole cloth, having its parentage in judicial legislation, we next turn to the reasons for this departure to determine whether those reasons still exist or whether the structure still stands after its foundations have antiquated and decayed.

The four main reasons for holding possession to be part performance discussed previously but can be re-enumerated here are fraud, livery of seisin, the trespasser argument, and the argument that the statute of frauds is procedural rather than substantive. The fourth of these arguments is not generally accepted and the third is inherently fallacious. Let us proceed then to inspect the remaining causes for the doctrine of part performance.

It is true that the livery of seison was a custom firmly emplant in the minds and habits of the people at the time of the enactment of the statute but it was this very custom that that statute was intended to change.³⁰ Today the custom of livery of seisin is forgotten. Why, therefore, should the courts continue to follow a rule the reason for which has long since ceased to exist.

This would make it appear that the only acceptable modern reason for the doctrine of part performance is to protect the parol contractee against fraud. If the court followed the Kentucky rule and refused to recognize part performance they could uphold the statute but give the complainant an equitable lien on the land to insure him against loss and that he would be returned to status quo. Under such a rule what fraud can he claim to have worked upon him other than his inability to enforce what by the statute he never had a legal right to enforce.³¹

The modern tendency is in recognition of the logic of the Kentucky rule and is expressed by Justice Strong of the Supreme Court of Pennsylvania:

"It cannot be overlooked that the tendency of modern decision has been to return to the plain reading of the statute. Experience has shown that the departures which courts of equity at first sanctioned have brought back all the evils which it was the purpose of the statute of frauds to remedy. They have caused the title to land, which in all civilized communities has been regarded as of first importance, to be dependent upon the frail recollection of witnesses, stimulated and per-

³⁰ *Poorman v. Kilgore*, 26 Pa. 365, 67 Am. Dec. 425.

³¹ *Usher v. Flood*, 83 Ky. 552.

verted by the apparent hardships of a particular case, a case which could never have arisen had the mandate of the legislature been obeyed."²²

In view of the fact that such a condition of variance, instability, and the opportunity for gain by the adoption of fraudulent practices nourished under the doctrine of part performance, the idea naturally occurs of a second legislative enactment enforcing a rule similar to the Kentucky rule which would accomplish the purpose intended by the original statute and curing the defects which decisions have given rise to in its administration. Would not the accomplishment of such a purpose, together with the stabilization and uniformity which would naturally result, be sufficient motive for legislative enactment in the furtherance of moral justice and universal equity?

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²² *Hill v. Meyers*, 43 Penn. St. Rep. 170.